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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 251

MILLINERY CREATOR'S GUILD, INC. (FORMERLY MILLINERY QUALITY GUILD, INC.), ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 177) is reported in 109 F. (2d) 175.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on February 19, 1940 (R. 187). The time for filing petition for certiorari was duly extended by an order of one of the Justices of this Court to July 18, 1940 (R. 188). Petition for certiorari was filed July 18, 1940, and was granted October 14, 1940.

The jurisdiction of this Court rests upon Section 5 of the Federal Trade Commission Act (15 U. S. C., sec. 45) and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether petitioners' combination to restrain interstate commerce by a boycott can be justified under the Sherman Act by showing that its purpose was to eliminate a trade abuse.

(2) Whether petitioners' combination can be justified on the ground that copying designs created by a competitor is unfair competition or "equitable tort."

(3) Whether petitioners have affirmatively established that the so-called style piracy against which their combination was directed is a trade abuse.

(4) Whether petitioners' combination was in purpose and effect one for price maintenance and therefore *per se* illegal under the Sherman Act.

(5) Whether, if the reasonableness of the restraints imposed is open for consideration, they were unreasonable and illegal because of the arbitrary and inequitable manner in which petitioners enforced their boycott.

STATUTE INVOLVED

The statute involved is the Act of September 26, 1914, c. 311, 38 Stat. 717 (15 U. S. C., Secs. 41 *et seq.*), known as the Federal Trade Commission Act. The pertinent provisions of this Act at the time the Commission issued its order are:

> SEC. 4. That the words defined in this section shall have the following meaning when found in this Act, to wit:
>
> "Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such

> Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.
>
> * * * * *
>
> SEC. 5.[1] That unfair methods of competition in commerce are hereby declared unlawful.
>
> The commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce.

Section 5 further authorizes any party against whom the Commission has entered a cease and desist order to obtain a review thereof in an appropriate circuit court of appeals; gives such court jurisdiction to affirm, set aside, or modify the order; and provides that the Commission's findings as to the facts, if supported by testimony, shall be "conclusive."

STATEMENT

This case involves the validity of an order of the Federal Trade Commission, issued under Section 5 of the Federal Trade Commission Act, directing the Millinery Creator's Guild, Inc. (formerly Millinery Quality Guild, Inc.) and various manufacturers of women's hats, to cease carrying out a plan to prevent so-called "style piracy" in designs for women's hats. The Millinery Creator's Guild, Inc. will be referred to herein as the Guild and the manufacturers named

[1] The Act of March 21, 1938, c. 49, 52 Stat. 111 (15 U. S. C., Supp. V, Sec. 45), amended each of the first two paragraphs of Section 5 by adding after the word "commerce" the words "and unfair or deceptive acts or practices in commerce."

as respondents in the Commission's complaint will be referred to as petitioners.[2] Of the 23 manufacturers against whom the Commission issued its order (R. 17), only six are now seeking reversal of the order.[3]

The Guild is a stock corporation dominated and controlled by petitioners (R. 8). Since July 1934 it has held itself out to the public as a membership corporation with a membership composed of petitioners (R. 8–9).

The case was heard on stipulated facts and the evidence introduced prior to the stipulation, together with the Commission's inferences from such stipulated facts and evidence (R. 89).[4] The facts found by the Commission may be summarized as follows:

---

[2] The Commission's findings referred to certain manufacturers as "member" respondents and others as "affiliate" respondents (R. 8–10). The grounds for this distinction were not material to the Commission's decision nor are they material to the present issue. Those named as "member" respondents originally sponsored the plan to eliminate "style piracy," controlled the Guild, and, after launching the plan, sought and secured participation therein by those named as "affiliate" respondents (R. 8–12). All of the manufacturers now contesting the validity of the Commission's order were named as "member" respondents.

[3] The 17 not now contesting the Commission's order are accounted for in the petition for writ of certiorari (p. 2) as follows: One did not "appeal" to the Circuit Court of Appeals, five are "no longer in business," and 11 are "no longer associated with" the Guild.

[4] Four of the manufacturers whom the Commission named as respondents did not join in the stipulation and additional evidence was introduced against them (R. 99). The Commission dismissed the complaint as to three of the four, finding that the evidence did not implicate these three (R. 15, 18).

The element of style is one of the most important factors in the sale of women's hats (R. 11). Certain manufacturers create their own designs for the hats which they make. Their designers, after observing prevailing style trends and fashions, particularly in Paris, devise adaptations, and these adaptations are considered in the industry to be original creations (*ib.*). Petitioners are all original creators in this sense and they constitute a substantial majority of the leading style originators in the industry (*ib.*). In general, they sell their hats at wholesale for about $8 a hat,[5] but some of them make hats to sell at a lower wholesale price (*ib.*). High-grade retailers of women's millinery, in order to offer a full line, are normally "required" to procure at least some of their models from petitioners (*ib.*).

Manufacturers who do not originate their own designs copy those of other manufacturers (R. 11). To prevent such copying, which is commonly known in the industry as "style piracy," petitioners in 1934 adopted the plan which the Commission found to be illegal.

Petitioners agreed with one another that after July 16, 1934, they would not sell or show any merchandise to any retail store unless it had signed an agreement entitled a "Declaration of Cooperation"

[5] While the findings and stipulation do not expressly so state, the $8 wholesale price mentioned therein undoubtedly refers to petitioners' customary minimum price. See R. 80. This was the interpretation placed upon the finding by the court below (R. 177).

promulgated by the Guild (R. 12).[6] By this agreement the retailer obligated itself not to buy "any copies of pirated styles created by members" of the Guild (R. 13). It also agreed (*ib.*) to stamp the following clause upon all its millinery orders:

> This order is placed upon the seller's warranty that the above styles of hats are not copies of styles originated by the members of The Millinery Quality Guild, Inc. The purchaser reserves the right to return any merchandise which is not as warranted.

The required Declaration concludes with an expression of appreciation for the "opportunity" afforded the retailer to lend its cooperation in a matter which "will lessen the confusion in our business and add to the profits" (R. 13).

The Guild employed a regular series of circular letters and follow-up literature designed to induce or coerce acceptance of the agreement (R. 13). These letters stated that the Guild membership comprised "practically every important creative firm in the millinery industry" and that only subscribing stores would be permitted to inspect or purchase petitioners' women's hats (R. 13–14). As a result of this campaign, about 1600 "high grade" retail dealers in women's hats located throughout the United States signed the Declaration of Cooperation (R. 12).

Petitioners publicly announced to the trade that they would not sell to retailers who had not signed the required Declaration (R. 14). They refused in

[6] The Declaration is set forth in full in the findings (R. 13).

some cases to sell to nonsignatories (*ib.*). In certain cases they were instrumental in getting retail stores to return purchased merchandise which the Guild had declared to be copies of hats originated by petitioners (*ib.*). Petitioners likewise agreed to expel from their "membership" any one of their number who failed to adhere to the terms of their plan and agreement (*ib.*). They expelled one manufacturer for this reason and notified the retail trade and the public generally of this expulsion (R. 15).

To facilitate operation of the plan, the Guild established a Registration Bureau with which any creator of an "original" design or style might register his model (R. 12).[7] Petitioners' usual practice was to regard any model which had been registered with the Bureau as an original design or style and they treated any imitation or copying thereof as design piracy (*ib.*). However, in the case of any alleged design piracy, filing and registration were not deemed conclusive but the matter was determined either by a committee of the petitioners or by the officers and employees of the Guild (*ib.*).

Petitioners, "except as to the understandings and agreements" previously set forth, "are engaged in substantial competition with each other" and with others carrying on a like business in the sale of women's hats in interstate commerce (R. 10–11).

The Commission found (R. 15) that the tendency and effect of petitioners' combination and of their

[7] The form for registration was very simple (Ex. 25–A and 25–B, R. 166B–166D). See also R. 72–73.

practices thereunder were unduly to hinder competition and to create monopoly in the sale of women's hats in interstate commerce by, *inter alia:*

(a) Limiting manufacturers as to their retail outlets and retailers as to their sources of supply;

(b) Depriving the public of the benefits of "normal price competition" among retailers;

(c) Preventing retailers from purchasing their requirements "except subject to the limitation and restriction" of petitioners' combination;

(d) Increasing the price of stylish women's hats to retailers and consumers "through the protection of profits" resulting from petitioners' "activities to eliminate from the trade alleged copies of styles which they claim * * * to have originated";

(e) Enabling petitioners to control the business of hat manufacturers "to the extent of limiting and as far as possible, eliminating the retail outlet" for hats copied from styles "originated" by petitioners.

On the basis of these findings, the Commission concluded that petitioners' practices constituted unfair methods of competition (R. 16) and an order was entered directing petitioners and the Guild to cease and desist therefrom (R. 16–18).

The court below unanimously held that petitioners and the Guild were engaged in a boycott which is unlawful under the Sherman Act and that the Commission was therefore justified in concluding that their method of restraining competition was unfair (R. 178). The Commission's order was

found to be appropriate to prohibition of this illegal boycott (R. 182) and was affirmed (R. 185–187).

SUMMARY OF ARGUMENT

I

Acts and practices which are unlawful under the Sherman Act constitute "unfair" methods of competition within the meaning of the Federal Trade Commission Act. Since petitioners substantially restrained interstate trade and competition by means of a boycott, their combination falls within the numerous decisions holding that such a restraint is prohibited by the Sherman Act.

II

Combinations to refuse to deal with others unless they accept the restrictions upon their trade which the boycotting group demands have been consistently held to be illegal under the Sherman Act. A restraint of this nature has been viewed as prohibited by the statute, so as to preclude defense thereof upon the ground that the restraint is reasonable.

Consideration of the reasons given for holding that price-fixing combinations are *per se* illegal under the Sherman Act supports the conclusion reached in the boycotting cases. Price fixing is held to be outlawed by the Act because of its necessarily destructive effect upon competition and a free market, which the Sherman Act was designed to maintain. A combination whereby, through a boycott, control is exercised over the entry into the market of competitors or a

competitive product is more destructive of freedom of trade than price fixing since the latter merely aims at eliminating one form of competition, price competition, whereas the former suppresses *all* competition (within the limits set by the boycotters) as to the persons or products subjected to the boycott.

III

There is no basis for justifying petitioner's combination as one confined to the prevention of unfair competition. It is settled that copying an "original" design is not unfair competition once products embodying the design have been offered for sale to the general public. Petitioner's failure to question the soundness of the decisions so holding is inconsistent with their reliance upon *International News Service* v. *Associated Press*, 248 U. S. 215. The leading decision denying design protection held that the *International News* case did not apply in this field, where determination of the scope and limitations of such protection would present almost insoluble legal and practical problems. In any event, the reliance upon unfair competition is merely a variant of the rejected contention that the purpose to prevent a trade abuse could justify such a combination.

IV

Restraint of trade by boycott, in any event, is at least *prima facie* illegal and requires justification. Petitioners, therefore, must affirmatively establish the justification upon which they rely, namely, that

copying of original designs is "unfair" and disastrous to the industry. The evidence not only does not establish their claim but such inferences as it warrants are adverse to petitioners. This Court will not piece out the details of a particular practice in an industry through the use of judicial notice; petitioners cannot convict the commission of error on the basis of additional facts presented by way of judicial notice to the reviewing courts. Furthermore, the cited publications do not support petitioners' claim.

V

The Commission found that petitioners' combination had the purpose and effect of depriving the public of the benefits of "normal price competition" and of enhancing prices to retailers and consumers. The evidence, together with the inferences which the Commission might legitimately draw therefrom, support this finding. Petitioners were therefore parties to a price-fixing combination illegal *per se* under the Sherman Act. A combination to maintain and stabilize prices, by eliminating from the market the product chiefly instrumental in rendering prices truly competitive, is *per se* illegal under the Sherman Act. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150.

VI

Irrespective of all other considerations, the restraints imposed by petitioners' combinations were unreasonable because the method used for enforcing the boycott was inherently arbitrary. The members of the boycotting group reserved to themselves the

sole voice in deciding whether petitioners' designs were "original" and whether they had been "copied."

ARGUMENT

I

THE COMMISSION'S ORDER IS VALID IF THE BOYCOTTING COMBINATION AGAINST WHICH IT IS DIRECTED IS ILLEGAL UNDER THE SHERMAN ACT

It is settled that all acts and practices which are unlawful under the Sherman Act constitute "unfair" methods of competition within the meaning of the Federal Trade Commission Act. "The Act undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed. * * * But as this Court has pointed out it also had a broader purpose * * *." *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, 310. The Trade Commission Act is not confined in its operation to "methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act." But the Sherman Act "shows a declaration of public policy to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress." *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 453. See also *Butterick Pub. Co.* v. *Federal Trade Commission*, 85 F. (2d) 522, 525–526 (C. C. A. 2d). It follows from these established principles that petitioners' practices may be illegal under the Trade

Commission Act even though they did not offend against the Sherman Act, but that if they did violate the latter statute they were plainly unlawful under the Trade Commission Act.

Petitioners' combination comes within the numerous decisions of this Court holding that any substantial restraint of interstate trade by means of a boycott violates the Sherman Act. We shall therefore rest our defense of the Commission's order primarily upon that ground.

Petitioners do not deny that they employed the weapon of the boycott to restrain interstate trade and competition. Their agreement not to deal with any retail store which failed or refused to sign a Declaration of Cooperation constituted a primary boycott of non-signatory stores. Through the instrumentality of this boycott and threat of boycott, petitioners induced some 1,600 stores not to purchase hats copied from petitioners' designs and this constituted a secondary boycott of the manufacturers of copied hats.[8]

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[8] "Trade association boycotts, in the nature of things, are group or combination boycotts. * * * The inducement of sellers or purchasers to refrain from selling or patronizing nonmember competitors of the Association results in a secondary boycott in the competitive struggle." Handler, *The Sugar Institute Case and the Present Status of the Anti-Trust Laws*, 36 Columbia Law Rev. 1, 14.

In passing upon the legality of boycotts by other than labor organizations, this Court has made no distinction between primary and secondary boycotts. The distinction may

The boycott substantially restrained interstate trade and competition. It denied to retail stores opportunity to deal in a free and untrammelled market. It required them to elect whether they would be shut off from the entire output of the so-called style originators banded together in the Guild or be shut off from all hats which the Guild members might determine were copies of designs which they had originated. The restraint upon the manufacturers of "copied" hats was equally direct and substantial. By the combination, 1,600 of the country's leading retail establishments were closed as outlets for this product. The power and capacity to restrain trade vested in the combination is sufficiently indicated by two stipulated facts (1) that every "high grade" retail dealer in women's hats was normally "required" to make at least some purchases from petitioners and (2) that the combination comprised, as petitioners represented to the retail trade, "practically every important creative firm in the millinery industry" (R. 89, 92; Ex. 7, R. 108).

This Court has repeatedly held that a combination to refuse to deal with third persons, or to deal with them only upon acceptance of conditions demanded by the boycotting group, violates the Sherman Act if the combination imposes any substantial restraint

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sometimes be important in boycotts by labor organizations where the incidence of the Sherman Act may be affected by exemptions given by the Clayton Act or by other special factors. See *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 466, 474–7; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 502–4, 507–8. See *United States* v. *Hutcheson*, No. 43 this Term.

upon interstate trade or competition (*infra*, pp. 15–16). Petitioners seek to escape the authority of these decisions by contending (1) that the style piracy against which their combination was directed is "unethical" and uneconomic, disavantageous to producers, distributors, and consumers, and hence a species of "unfair competition" or a "trade abuse"; and (2) that a boycott entered into for the purpose of eliminating "unfair competition" or a "trade abuse" may be defended upon the ground that the restraints which it imposes are reasonable and therefore not illegal.

The Government wishes to meet at the outset the contention that a combination to control the course of trade, through the weapon of the boycott, is open to the defense that this coercive use of power may escape the prohibitions of the Sherman Act if the boycotters can successfully show that they were engaged in stamping out practices which they deem inimical to themselves and to the industry as a whole.

II

A COMBINATION TO USE THE INSTRUMENTALITY OF THE BOYCOTT TO EXCLUDE OTHERS FROM ALL OR A PART OF THE MARKET IS ILLEGAL UNDER THE SHERMAN ACT AND CANNOT BE JUSTIFIED UPON THE GROUND THAT ITS PURPOSE IS TO ELIMINATE A TRADE ABUSE

1. This Court has consistently held that combinations which use the instrumentality of the boycott to exclude others from the market, or to impose conditions or limitations upon the conduct of their interstate trade, violate the Sherman Act. In none of

the leading decisions, set out in the margin,[9] did this Court find it necessary to enter upon an inquiry into the reasonableness of the restraint. A restraint "aimed at compelling third parties and strangers involuntarily not to engage in the course of [interstate] trade except on conditions that the combination imposes" and restricting their "liberty" to engage in such trade is an unreasonable restraint forbidden by the Sherman Act. *Loewe* v. *Lawlor*, 208 U. S. 274, 293–294.

In the recent case of *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, this Court said (at p. 497):

> The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman law. They were con-

[9] *Montague & Co.* v. *Lowry*, 193 U. S. 38; *Loewe* v. *Lawlor*, 208 U. S. 274; *Straus* v. *American Publisher's Ass'n*, 231 U. S. 222; *Eastern States Lumber Dealers' Ass'n* v. *United States*, 234 U. S. 600; *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291, 311, 312; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Ass'n*, 274 U. S. 37, 54; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30, 43–44; *United States* v. *First National Pictures, Inc.*, 282 U. S. 44, 54; *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 587–589, 601; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 220–221.

Anderson v. *United States*, 171 U. S. 604, is sometimes cited as a contrary authority. That case held that an agreement by members of an exchange, composed of traders in livestock on a stockyards, not to deal with any non-member trader did not violate the Sherman Act. The decision has subsequently been treated as resting on the holding that the facts did not disclose any restraint upon *interstate* commerce coming within the purview of the act. *Montague & Co.* v. *Lowry*, *supra*, p. 48; *Loewe* v. *Lawlor*, *supra*, p. 297; *Swift & Co.* v. *United States*, 196 U. S. 375, 397–398.

> tracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production, and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market * * *.

The Court then observed (at p. 498):

> * * * the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination * * * having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law * * *.

In *Johnson* v. *Joseph Schlitz Brewing Co.*, 33 F. Supp. 176, 181 (D. C. E. D. Tenn. S. D.), an agreement by three brewing companies not to sell to each other's customers was held to violate the Sherman Act. After an extended review of the decisions of this Court, the conclusion was reached that

> To fix customers in agreement with others is inherently as bad as to fix prices. Both stifle competition and lead to monopolistic power.

As this Court observed in *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, there

is a difference between the refusal of a single concern, acting alone, to deal with another, and a combination with others to boycott a third person. In its opinion the Court stated (p. 574):

> An act lawful when done by one may become wrongful when done by many acting in concert taking on the form of a conspiracy which may be prohibited if the result be hurtful to the public or to the individual against whom the concerted action is directed.

2. The Circuit Court of Appeals for the Second Circuit, after its decision in the case at bar, again upheld the validity of an order of the Federal Trade Commission directed against a boycott combination corresponding in all essential respects to that here involved, *Fashion Originators' Guild* v. *Federal Trade Commission*, argued herewith, No. 537, this Term.[10] The rationale of the decision in No. 537 has a direct bearing on the disposition of the present case. The court there found it unnecessary to decide whether style piracy was a socially useful form of competition[11]

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[10] The decision, which is reported in 114 F. (2d) 80, is written by Judge Learned Hand, the other members of the court being Augustus N. Hand and Chase. In the instant case the court was composed of Judges Swan, Augustus N. Hand, and Clark.

[11] In this case, the court considered whether style piracy was a socially useful form of competition aud concluded that it was. It stated (R. 180–181) that the purpose and necessary effect of petitioner's combination was to maintain their "price structure," that style piracy made "the latest fashions readily available to" purchasers of small means, and that this form of competition was therefore socially desirable.

and held that the character of the combination brought it within the direct condemnation of the Sherman Act. Judge Learned Hand, speaking for the court, said (at p. 84):

> Certainly it is not true that the lawfulness of every combination depends upon whether it "reasonably" corrects trade "abuses"; there are some combinations that nothing will excuse. The accepted rubric for this is that when the means are unlawful per se, the purposes of the confederates will not justify them. *Sugar Institute* v. *United States, supra,* 599 (297 U. S. 553). The most recent example of this is the Supreme Court's reaffirmation of the unconditional illegality of price-fixing * * *.
>
> * * * * *
>
> Price fixing is not, however, the only means unlawful *per se;* the interest of the consumer is not all that determines the "reasonableness" of a contract "in restraint of trade." It is also unlawful to exclude from the market any of those who supply it—assuming that there is no independent reason by virtue of their conduct to justify their exclusion—and it is no excuse for doing so that their exclusion will result in benefits to consumers, or to the producers who remain.

This conclusion that a boycotting combination of the kind here involved is *per se* illegal under the Sherman Act is supported not merely by the cases which were previously cited and discussed (*supra,* pp. 15–18). It derives additional strength from the basic ground upon which price fixing has been held

to be *per se* illegal under the Sherman Act, namely, its destructive effect on competition and a free market. The aim and result of price fixing "is the elimination of one form of competition" and this aim and result runs counter to the assumption on which the Sherman Act is based, that "the public interest is best protected from the evils of monopoly and price control by the maintenance of competition." *United States* v. *Trenton Potteries*, 273 U. S. 392, 397. A price-fixing agreement frequently gives its members power to control market prices. The Act outlaws such agreements because they confer "power to destroy or drastically impair the competitive system." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221. But a combination which tampers with price structures is unlawful even if the members are in no position to control the market for "to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces." *United States* v. *Socony-Vacuum Oil Co.*, *supra*, at p. 221.

A combination to exclude competitors or a competitive product from the market is well within the principles so recently affirmed by this Court. Such a combination *directly* destroys competition and freedom of the market. Petitioners' boycott, by excluding "copied" hats from the market, enabled them to capture a larger share of the market than would otherwise have been theirs. Each petitioner

was enabled to monopolize the market with respect to the designs which it had originated.[12] Each was enabled to fix its prices without fear of competition from lower priced hats of like design. As to all the designs which petitioners assumed to preempt, consumers were denied the advantage of competitive offerings and other manufactures were denied opportunity to compete in either price or quality. The destruction of competition and of freedom of the market was thus more direct and serious than where buyers or sellers combine for the purpose of fixing, manipulating, or stabilizing prices. The fact that the combination did not suppress all competition does not make the restraint any the less illegal. *United States* v. *Socony-Vacuum Oil Co., supra*, at p. 220; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30, 44.

3. The argument that any such combination can be justified upon the ground that its purpose is to eliminate a trade abuse has been passed upon and definitively rejected by this Court. The argument advanced on behalf of petitioners is analogous in essential respects to that addressed to this Court in *Eastern States Lumber Dealers Ass'n* v. *United States*,

[12] The court in the *Fashion Originators' Guild* case in referring to this aspect of the combination, said (p. 85): "It is true that the sanction of that monopoly may be very weak; it depends upon the design's attractions above over designs, often not a very important margin of advantage. But the same is true of nearly all monopolies, for there are substitutes for most goods."

234 U. S. 600, 613. In reply the Court declared (at p. 613):

> The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted.

An analogous contention was raised on behalf of the illegal combination involved in *United States* v. *First National Pictures, Inc.*, 282 U. S. 44, where the principal distributors of motion-picture films had agreed not to enter into new contracts with purchasers and transferees of motion-picture theaters unless the latter accepted certain conditions which the distributors had agreed to impose. The District Court found that the purpose of the agreement was to eliminate "trade abuses" which were "general" and caused "substantial losses" and that "such restraints as may have resulted from what was done were incidental to this legitimate purpose."[13] On the basis of these findings the District Court concluded that the restraint was not unlawful. This Court took a different view. It observed (at p. 54) that the obvious purpose of the agreement was to

[13] *United States* v. *First National Pictures, Inc.*, 34 F. (2d) 815, 816, 819 (D. C. S. D. N. Y.).

secure "concerted action for the purpose of coercing certain purchasers of theaters by excluding them from the opportunity to deal in a free and untrammeled market," and, accordingly, it held that such an agreement "conflicts with the Sherman Act." Since no reference was made to the District Court's findings, this Court, in effect, held them to be irrelevant and insufficient to justify the defendants' boycotting combination.

United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, at 221, gives the most recent answer to the contention that any combination destructive of a free market and the competitive system may ever justify its existence. This Court, speaking through Mr. Justice Douglas, stated (at pp. 221–222):

> The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. * * *

We submit that a similar answer should be made in this case to the argument on behalf of the combination against which the order of the Commission is directed.

4. The inferior Federal courts in cases arising under the Trade Commission Act have on numerous occasions applied the principles enunciated by this Court under the Sherman Act and have consistently held that restraints of interstate competition by a group boycott is an unfair method of competition which the Trade Commission is authorized to prohibit.[14] These decisions should be approved by enforcing the order in the case at bar.

III

THE COMBINATION CANNOT BE JUSTIFIED ON THE GROUND THAT COPYING DESIGNS CREATED BY A COMPETITOR IS UNFAIR COMPETITION OR "EQUITABLE TORT"

In the *Fashion Originators' Guild* case, No. 537, this Term, the Circuit Court of Appeals for the Second Circuit stated (at 85–86) that the order should be understood as not applying to "cases in which a retailer knowingly buys dresses, access to the design

[14] *National Harness Mfrs.' Ass'n* v. *Federal Trade Commission*, 268 Fed. 705, 710–712 (C. C. A. 6th); *Western Sugar Refinery Co.* v. *Federal Trade Commission*, 275 Fed. 725, 733, 741–742 (C. C. A. 9th); *Wholesale Grocers' Ass'n* v. *Federal Trade Commission*, 277 Fed. 657, 663–664 (C. C. A. 5th); *Southern Hardware Jobbers' Ass'n* v. *Federal Trade Commission*, 290 Fed. 773, 779–781 (C. C. A. 5th); *Chamber of Commerce* v. *Federal Trade Commission*, 13 F. (2d) 673, 687, 696–697 (C. C. A. 8th); *Arkansas Wholesale Grocers' Ass'n* v. *Federal Trade Commission*, 18 F. (2d) 866, 868, 872 (C. C. A. 8th), certiorari denied, 275 U. S. 533; *Federal Trade Commission* v. *Wallace*, 75 F. (2d) 733, 735–736 (C. C. A. 8th); *Butterick Pub. Co.* v. *Federal Trade Commission*, 85 F. (2d) 522, 525–526 (C. C. A. 2d).

of which has been procured (1) by fraud, (2) bribery or other crime, (3) breach of contract, or (4) before the design has 'by publication' come into the public demesne." The Second Circuit thus apparently assumed that a concerted refusal to deal is proper if its purpose and sole effect is merely to prevent conduct which is illegal or tortious. This rationale, even if sound, does not in any way aid the petitioners.

1. The petitioners, at the outset, cannot show that copying or imitating their designs constitutes a species of unfair competition or equitable tort. Whether or not it be a trade abuse, such copying does not result in that type of injury for which the courts give redress. When a hat embodying a so-called original design is offered for general sale, this is a publication of the design and, thereafter, the originator has no further property right in the design and no right to exclude others from its use. *Cheney Bros.* v. *Doris Silk Corp.*, 35 F. (2d) 279 (C. C. A. 2d), certiorari denied, 281 U. S. 728; *Fashion Originators' Guild* v. *Federal Trade Commission*, 114 F. (2d) 80, 83–84, No. 537, this Term.

(a) The *Cheney Bros.* case is the leading authority for the proposition that after goods of "original" design have been offered for general sale, competitors are free to copy the design at will.[15] Judge Learned

[15] See also *Krem-Ko Co.* v. *R. G. Miller & Sons, Inc.*, 68 F. (2d) 872 (C. C. A. 2d); *Sinko* v. *Snow-Craggs Corp.*, 105 F. (2d) 450, 452 (C. C. A. 7th); *Lewis* v. *Vendome Bags, Inc.*, 108 F. (2d) 16, 18 (C. C. A. 2d), certiorari denied, 309 U. S.

Hand there pointed out the almost insuperable difficulties which would confront any court were it to recognize any property right in a published design, in ascertaining both the circumstances giving rise to the right and its scope and limitations. He stated (p. 280) that it would have to determine the question of original creation *tabula rasa;* that it would have to dispense with the conditions upon the creation of the right imposed by the "copyright law"; that it would not know whether the duration of the right would be that prescribed by copyright law or "should extend as long as the author's grievance"; that the right would logically embrace not merely designs, but processes, machines, and secrets as well. He then held, on behalf of the court, that this was a matter in which Congress alone was authorized to act, saying:

> To exclude others from the enjoyment of a chattel is one thing; to prevent any imitation of it, to set up a monopoly in the plan of its structure, gives the author a power over his fellows vastly greater, a power which the Constitution allows only Congress to create.

Other aspects of this complicated problem are set forth in the quoted opinion, to which we respectfully refer the Court.

660; *Electric Auto-Lite Co.* v. *P. & D. Mfg. Co.*, 109 F. (2d) 566, 567 (C. C. A. 2d).

For favorable comment in legal periodicals on the *Cheney Bros.* case, see, Case Comment, 43 Harv. L. Rev. 330 (1929); Case Comment, Col. L. Rev. 135 (1930); Note, 14 Minn. L. Rev. 537, 544–545 (1930); Chafee, *Book Review*, 43 Harv. L. Rev. 1328, 1330 (1930).

(b) Petitioners urge that the copying of their designs is analogous to the situation presented in *International News Service* v. *Associated Press*, 248 U. S. 215. However, they fail to mention the fact that in the *Cheney Bros.* case (the soundness of which they do not attack [16]) the Second Circuit held (p. 280) that the *International News* decision covered only "situations substantially similar to those then at bar," that it was not intended to have the effect of creating "a sort of common-law patent or copyright for reasons of justice", and that it did not apply to the copying of published original designs.

We submit that this interpretation of the limited scope of the *International News* decision is sound.[17] The holding in that case was that when the members of a newsgathering agency have created, at considerable expense, something of value which dissipates upon publication, publication constitutes an

[16] Petitioners in the *Fashion Originators Guild* case likewise do not attack the soundness of this decision but they attempt to distinguish it (Br., p. 32) upon the ground that it involved only the "casual copyist." We submit that the case cannot be distinguished upon this ground. Not only is there nothing in the court's statement of the facts to indicate that the defendant there was a casual copyist but, of more importance, the reasons given for the decision are equally as applicable to deliberate, continuous copying as to "isolated reproduction."

[17] The Court divided five to three. Mr. Justice Clarke did not participate in the decision, Mr. Justice Brandeis dissented, and Justices Holmes and McKenna were of the opinion that International News Service was entitled to use the news gathered by Associated Press provided that when newspapers served by the former organization published the news they made a due acknowledgment of its source.

abandonment of any right of exclusive use with respect to use by the general public but not with respect to commercial exploitation by a competitor. This theory that a competitor may not appropriate as his own the product of another's labor was there enunciated in circumstances materially different from those at bar. There was no difficulty in the *News* case in determining the originator of the copied product; but a determination of originality of the design of a fabric or wearing apparel requires exceedingly close distinctions in a field without judicial landmarks. There was no problem there similar to that raised here with respect to the multiplicity of determinations which recognition of the right to design protection would entail. The added burden of litigation in the design field would literally be staggering.[18] The length of the protection afforded in the *News* case was merely for a few hours and, so far as appears from the majority opinion, would not seriously affect the ability of the public to obtain adequate sources of information. But cf. Mr. Justice Brandeis, dissenting, 248 U. S. at 262–267. Petitioners' argument in the case at bar seems to be that protection should be given during the entire "fashion" season. Such protection in this field would deprive the consuming public of the right to buy "fashion" as typified in the protected designs except on such terms as the originator of any design

[18] See Worthy, *The Millinery Industry*, Work Materials No. 53, NRA Industry Studies Section, pp. 37–38 (quoted in Appendix to petitioners' brief, pp. 39, 46–47.)

chose to extend. And there would be no assurance that the multitude of designs entitled to protection would not blanket the style field and give their originators, in combination, a monopoly of the "fashion" which they assertedly sell (see *infra*, p. 37). These circumstances can scarcely be deemed immaterial with respect to whether the *International News* case should be extended into fields as yet unexplored.[19]

(c) In an effort to bolster the proposition that the systematic copying of published designs is unfair competition, petitioners in No. 537 (*Fashion Originators' Guild* case) urge that an actionable tort is proved whenever a plaintiff can establish the loss of trade due to conduct on the part of a defendant which society condemns. Granting that damage could be proved, petitioners (in No. 537) fail to make a convincing argument that the practice of copying published designs is a wrong which the law should recognize. They frankly admit that no statutory protection has been extended to published designs except insofar as the design patent laws are applicable, and they do not claim to have complied with those laws. Their entire appeal is directed to the

[19] The courts have shown little inclination to apply the *International News* decision to other types of copying. Note, *The Imitation of Advertising*, 45 Harv. L. Rev. 542, 543–545 (1932); *Developments in the Law*, 46 Harv. L. Rev. 1171, 1193–1195 (1933); Note, *Recognition of Legal Rights in Ideas*, 47 Harv. L. Rev. 1419, 1426 (1934); Handler, *Unfair Competition*, 21 Iowa L. Rev. 175, 191 (1936); *RCA Mfg. Co.* v. *Whiteman*, 114 F. (2d) 86, 90 (C. C. A. 2d).

Court's sense of moral justice. To lend color to their claim the practice of copying published designs and those who engage in the practice are referred to throughout the brief as "style piracy," "style pirates," "professional parasitism," "parasite," "cheat," and "shocking to ordinary business morality" (for example, see petitioners' brief in No. 537, pp. 18, 24, 25, 32).[20] While such terms may indicate the attitude of one part of an industry toward another part, it can hardly be said that they are indicative of the moral judgment of society.

Petitioners (in No. 537) insist that the approval by the Federal Trade Commission of codes of fair competition condemning the copying of original designs amounts to a condemnation of the practice by the Commission. Those codes are prepared by industry and are merely a statement of what the industry regards as ethical conduct. There are no sanctions by which the codes may be enforced. Likewise, the NRA codes cited by petitioners (in No. 537) lend little support to their argument. Provisions in those codes prohibiting so-called design piracy were sought by industry. After the first year few if any

[20] The technique adopted is analogous to that customarily used in attempting to justify price maintenance by referring to those who refuse to maintain the established price as "chiselers," "price cutters," etc. Likewise, the literature on the evils of "style piracy" is certainly no more extensive than the literature on the evils of "price cutting." In the absence of statutory prohibitions, the courts have never regarded "price cutting" as a wrongful conduct giving rise to an action in tort.

provisions of this type were approved by the Administrator. The principal objector to such provisions was the Consumers' Advisory Board whose duty it was to protect the public interest. Johnston & Fitch, *Design Piracy*, Work Materials No. 52, Trade Practice Studies Section (March 1936), pp. 131–137.

Petitioners' argument in both of these cases (Nos. 251 and 537) completely disregards the fact that under the Constitution the limits of wrongful conduct in this particular field are defined by the patent and copyright laws. In accordance with the requirements of the Constitution those laws permit a limited monopoly for the exploitation of new inventions or ideas. To adopt petitioners' argument (in Nos. 251 and 537) would be to extend the monopolistic privilege far beyond the limits contemplated by the Constitution or statutes because the alleged social undesirability of copying would continue as long as the monopoly was profitable. Furthermore, the monopoly [21] would be created by judicial fiat in direct conflict with the legislative declaration of public policy contained in Section 2 of the Sherman Act, which forbids the creation of any monopoly regardless of purpose.

2. (a) In any event, the mere existence of unfair competition does not warrant petitioners in adopting

[21] In the instant case, the court below said (R. 376): * * * the courts have refrained from enjoining the pirate because they will not support a monopoly in an unpatentable idea. It would be strange to say that the Guild may establish this same monopoly by extrajudicial methods.

whatever form of self-help they choose. *Sugar Institute* v. *United States*, 297 U. S. 553, 559. The system under which ladies hats (and dresses, in No. 537) are manufactured and distributed is concededly one in which a substantial number of manufacturers systematically "copy" the designs originated by others. It is that system which the petitioners are seeking to modify by means of a boycott designed to exclude the copyists from the market. The assertion that the Federal Trade Commission Act and the Sherman Act does not protect from interference trade which has no right to exist begs the question. As this Court has declared, in effect, the governing principle of the Sherman Act is that the interest of the public is best served by protecting from boycotting combinations that system of competition which the public authorities have permitted to develop and exist (*supra*, pp. 20–21). The reliance upon the allegedly unfair competition is merely another variant of the ostensible justifications for price-fixing and other proscribed combinations which have been rejected in numerous cases arising under the Sherman Act (*supra*, pp. 21–23, 29–30).

(b) The contention that style piracy is a type of unfair competition or equitable tort would, if sound, be ground for an injunction forbidding the continuation of the practice. Cf. *International News Service Co.* v. *Associated Press*, 248 U. S. 215. The Federal Trade Commission, in any event, would appear to have ample authority to enjoin such practice if, in

fact, it is an unfair method of competition. And the remedy of statutory aid to the industry through action by Congress is always open. The failure of these authorities as well as the federal courts to prohibit copying as a business practice under the competitive system can scarcely be construed as an unrestricted license to private groups to use self-help to accomplish the same end. *Sugar Institute* v. *United States*, 297 U. S. 553, 559.

(c) The factors bearing upon the wisdom of extending the doctrines of unfair competition enunciated in the *International News* case into the field of design likewise bear directly on the issue more immediately before this Court. They show that such an extension should be made only after a painstaking analysis of all the economic and social consequences that might be expected. The cases under the Sherman Act have consistently rejected the analogous contention that a price-fixing or other proscribed combination can be justified before the judiciary by an examination of the social and economic consequences of current business practices (*supra*, pp. 20–21, 23). See *United States* v. *Socony-Vacuum Oil Co*, 310 U. S. 150, 220–221.

The contentions made on behalf of petitioners and answered under our Points II and III may be summarized as follows:

Petitioners are asking this Court to hold that the Sherman Act and the Trade Commission Act permit private interests to use the instrumentality of the boycott to police an interstate industry and to stamp out widespread business practices merely because the

boycotting combination itself conceives them to be "unfair competition" or "unethical." They are asking this Court to sanction employment of this private policing system to stamp out such practices despite the fact that only Congress, not the courts, has been held to possess such power.[22] They are asking the Court to give this sanction notwithstanding the fact that Congress has repeatedly, during the last 25 years, declined to act.[23] They are asking the Court to approve use of the boycott by a strategically located minority of an industry to achieve a far-reaching change in industrial practices which a vast majority of the members of the industry strongly oppose.[24]

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[22] In *Cheney Bros.* v. *Doris Silk Corp., supra*, the court said (p. 281): "Judges have only a limited power to amend the law; when the subject has been confided to a Legislature, they must stand aside, even though there be an hiatus in completed justice. An omission in such cases must be taken to have been as deliberate as though it were express, certainly after long-standing action on the subject-matter. Indeed, we are not in any position to pass upon the questions involved, as Brandeis, J., observed in *International News Service* v. *Associated Press*."

[23] Since 1914 some 21 bills for design protection have been introduced into Congress but although some have had success in one branch of Congress, none has yet been enacted. *Self-protection of Design Creation in the Millinery Industry*, Note, 49 Yale L. J. 1290, 1293 (1940). The bills covering the period 1914–1935 are set forth in Johnston & Fitch, *Design Piracy*, Work Materials No. 52, N. R. A. Trade Practice Studies Section, p. 5. For a detailed statement of the most important of these legislative proposals, see Johnston & Fitch, at pp. 153–165.

[24] Worthy, *supra* note 18, at p. 86, in explaining why no provision dealing with style piracy was included in the NRA Millinery Code says: "The controlling fact was that

IV

PETITIONERS FAILED TO ESTABLISH EVEN THAT THE "STYLE PIRACY" WHICH THEY COMBINED TO PREVENT IS A TRADE ABUSE

Even if there can be any justification for a restraint of trade by a boycott, that boycott is at least *prima facie* an illegal restraint,[25] and the burden rests on petitioners to justify that restraint. The justification upon which they rely is that the copying of their designs is unfair, unethical, and a trade abuse. We submit that the evidence falls far short of affirmatively establishing that this is a correct characterization of the copying here involved.

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only a small minority was in favor of the elimination of style piracy." He further said that by and large, it was safe to assume that the style originators who favored such a provision "do not constitute much more than 10 percent of the industry."

Johnston & Fitch, *supra*, p. 55, reports that "it is stated that protection [of designs] would perhaps put 80% of the industry out of business."

There is a similar division of opinion in the women's dress industry. Johnston & Fitch, *supra*, pp. 176–178. It is there reported that manufacturers producing garments wholesaling at $10.75 or above "are apparently satisfied"; that "dissatisfaction has crystallized in the lower price groups"; that manufacturers whose garments are wholesaled under $6.75, "are faced with the necessity of accepting a large volume of returns [20,000 dresses were 'returned to copyists' during three months] * * * and * * * must either begin to originate their designs and seek Guild protection or cater to chain stores and similar outlets"; that 75 firms in the $4.75 market had organized an association to protect their interests, charging the Guild with engaging in "such unfair competition as monopoly, boycott, and price-fixing."

[25] Compare *United States* v. *American Livestock Commission Co.*, 279 U. S. 435, 437; Restatement of Torts, Sec. 765 (1).

All that the evidence shows is that those who originate their own designs go to considerable expense in devising new designs; that these design originators are known in the industry as "original creators"; that copying their designs is commonly known in the industry as "style piracy"; and that such copying adversely affects the sale of hats of "original" design.[26] Even if the terminology in use in the industry be taken as indicating that the industry considers copying of designs an unfair, or opprobrious practice, this is not decisive of its character. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 220–221. Still less can deficiencies in the evidence be supplied by reliance on the conclusion, reached in certain cases on other records and other facts, that copying of original designs for women's clothing is an undesirable trade practice. See *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild of America, Inc.*, 90 F. (2d) 556 (C. C. A. 1); *Wolfenstein* v. *Fashion Originators' Guild of America, Inc.*, 244 App. Div. (N. Y.) 656.

Petitioners having failed to meet the burden resting on them to show affirmatively that copying of so-called original designs is a trade abuse or evil, the Court would not be warranted, in the absence of such showing, in assuming this to be the case. The information requisite to passing judgment upon the good or bad character of what petitioners call "style piracy" is almost completely lacking. The

[26] R. 13, 92; Exs. 14–A and 14–B, 15–A and 15–B, R. 116–119.

evidence does not show that the designs which petitioners label "original" creations involve any substantial element of creativeness. The evidence does not negative the likelihood that mere difference is the actual touchstone of a so-called original design. It does show that petitioners' designs were largely "adaptations" of Parisian models (R. 11), and it does not negative the probability that the line between such adaptation and imitation thereof is a shadowy one, lacking any real significance.

Such inferences as the evidence warrants are adverse to petitioners. Twenty-seven manufacturers were named as respondents in the Commission's complaint and they were all design originators (R. 9–10, 11). There are other design originators in the industry (R. 11). Each must offer a sufficient number of models to satisfy the varying tastes and requirements of its customers. With upwards of 27 firms thus engaged in producing "original" designs, it may well be inferred (1) that "original" means no more than "different" and (2) that this output of "original" designs would, collectively, blanket the market with the result that other manufacturers would have to make and sell either outmoded styles or exact reproductions of Parisian models.[27]

[27] Under the similar set-up for registration of "original" designs and boycotting copied designs in effect in the women's dress industry, from 40,000 to 50,000 "original" designs were registered each year. *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild of America, Inc.*, 90 F. (2d) 556, 562 (C. C. A. 1).

Petitioners themselves show (Br., p. 4) that what they really seek to exploit and combined to protect is, not originality of design, but exclusiveness pure and simple.[28]

Petitioners, apparently aware that the record is barren of evidence to support their claim that so-called style piracy is a competitive evil, rely upon two mimeographed bulletins issued under the auspices of the Division of Review of NRA.[29] We do not deny that the Court may take judicial notice of these bulletins, but the validity of the Commission's orders must be determined on the basis of the evidence before the Commission and the facts stated in these bulletins and in other documents referred to by petitioners are not part of this evidence. Whatever the proper place of judicial notice as an aid in expediting administrative proceedings,[30] petitioners hardly can convict the Commission of error on the basis of additional facts presented by way of judicial notice in the reviewing courts. Further-

[28] Petitioners, under the heading of "Analysis of 'Style Piracy,'" assert that a woman buying a hat requires something more than it be in fashion: "She wants it to be distinctive—that is to say, her hat. It must be different from other hats she sees, so that it will be her hat. * * * The number of duplications of the hat must not be too great in any particular area for otherwise women will see their hats 'walking down the street' which they do not like."

[29] This Division was established by an Executive Order issued in June 1935 after the regulatory provisions of Title I of the National Industrial Recovery Act had been held unconstitutional.

[30] *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 288–290; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93–94.

more, even though judicial notice may be taken of the bulletins themselves, this Court has held that where the details of a particular practice in an industry are an issue in a case, this Court will not piece them out by judicial notice but will require that they be established by competent proof. *Borden's Co. v. Baldwin*, 293 U. S. 194, 208–209.

Aside from these objections the contents of the bulletins fail to support petitioners' position. We have already pointed out (*supra*, note 24, pp. 34–35) that they report that a vast majority of the industry is opposed to outlawing so-called style piracy. On the broader economic aspects of this practice, the bulletins present the conflicting contentions of proponents and opponents but express no conclusion on the merits of the controversy.[31]

V

PRICE MAINTENANCE WAS AN OBJECTIVE AND EFFECT OF PETITIONERS' COMBINATION AND IT WAS THEREFORE PER SE ILLEGAL UNDER THE SHERMAN ACT

The combination formed by petitioners was one for price maintenance. The underlying objective of the combination was to enable petitioners to maintain the high prices at which they marketed their hats of "original" design, by eliminating as a market factor the source of the only really effective price competition in the field of high-priced stylish millinery,

[31] See the extract from Worthy, *supra*, quoted in Appendix to petitioners' brief, pp. 39–53; Johnston & Fitch, *supra*, pp. X–XII, XV–XVI, 58–64, 193–202.

"copied" hats. The Commission found (R. 15) that the "capacity, tendency, and result" of the "purpose plan and agreement" entered into by petitioners have been "unduly to hinder competition and to create monopoly in the sale of women's hats in interstate commerce:"

* * * * *

> (b) By depriving the public of the benefits of normal price competition among retailers of stylish hats for women, and
>
> * * * * *
>
> (d) By increasing the price of stylish hats for women to retailers and consumers through the protection of profits resulting from respondents' [petitioners'] activities to eliminate from the trade alleged copies of styles which they claim and adjudge themselves to have originated;

There is evidence to support these findings. In one of the circular letters soliciting Declarations of Cooperation which the Guild sent to retail stores, it wrote (Ex. 13, R. 115):

> we have all the important stores in New York City and the main centers not only signed to our agreement, but also enthusiastic in this effort to protect the value of their merchandise.

In another such letter the Guild wrote that if the retail merchants will "back up" the Guild program, their customers "will not complain that the hat purchased yesterday from you is now on sale next door at half price" (Ex. 14–A and 14–B, R. 117).

In a letter to an officer of a store which had not yet signed the Declaration, the Guild wrote: "The agreement tends to improve price levels, curtail mark-downs, and establish the value of the merchandise on hand" (Ex. 21, R. 163).

The foregoing specific evidence, as well as the stipulated facts as to the general character of petitioners' combination and of their activities thereunder, clearly support the inferences which the Commission drew therefrom.[32] A court may not substitute its judgment for that of the Commission as to the inferences reasonably to be drawn from the evidence (*Federal Trade Commission* v. *Pacific States Paper Trade Ass'n*, 273 U. S. 52, 63), and in the present case the court below accepted and approved the finding that price maintenance was a major objective of the combination.[33]

In these circumstances, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, establishes the illegality of petitioners' combination. There, as here, there was no agreement to charge or to pay uniform prices and no attempt to eliminate *all* price competition; but there, as here, the combination undertook to maintain and to stabilize prices by

[32] Compare Johnston & Fitch, *supra*, where, in discussing design piracy, it is stated (p. X): "The problem, typically, is a price problem."

[33] The court said (R. 180, 181): "It is safe to say that the members of the Guild instituted their antipiracy campaign to protect their markets and price levels, as well as to improve business morals within the industry. * * * The purpose of the milliners, and the necessary effect of their combination, is to maintain their price structure, * * *."

eliminating from the market the product chiefly instrumental in rendering prices truly competitive.[34] There, as here, the defense interposed was that the concert of action constituted a reasonable plan and device to prevent or mitigate competitive evils. The Court in the *Socony-Vacuum Oil* case rejected this defense. It held that the Sherman Act renders illegal every combination formed for the purpose and with the effect of controlling, manipulating, or otherwise tampering with prices or the price structure. In that case the means used, group purchasing, was comparatively innocuous. *A fortiori*, the combination in the present case is illegal since the means used, the boycott, is itself illegal.

VI

EVEN IF THE REASONABLENESS OF THE RESTRAINTS IMPOSED BY PETITIONERS' COMBINATION WERE OPEN FOR CONSIDERATION, THE ARBITRARY AND INEQUITABLE MANNER IN WHICH THE BOYCOTT WAS APPLIED WOULD MAKE THE RESTRAINTS UNREASONABLE AND ILLEGAL

Finally, if we assume *arguendo* (1) that a boycotting combination like the present one is not illegal *per se* under the Sherman Act, (2) that petitioners have affirmatively established that style piracy is a trade abuse, and (3) that petitioners' combination is not one for price maintenance which is *per se* illegal, petitioners even then could not succeed. The restraints imposed would still be unreasonable and

[34] In that case the product eliminated was "distress" gasoline; in the instant case it is "copied" hats.

therefore illegal because of the arbitrary manner in which the boycott was enforced. The applicable rule is stated in *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 599, *supra:*

> The freedom of concerted action to improve conditions has an obvious limitation. The end does not justify illegal means. The endeavor to put a stop to illicit practices must not itself become illicit. As the statute draws the line at unreasonable restraints, a cooperative endeavor which transgresses that line cannot justify itself by pointing to evils afflicting the industry or to a laudable purpose to remove them.

Petitioners' combination provided that in any case of alleged design "piracy," petitioners themselves or the Guild (which they dominated and controlled) would determine this question (R. 12). This method of enforcement, as applied to nonmembers of the Guild, was inherently unreasonable and arbitrary. It meant that when a dispute arose, those associated with *one* of the adversary parties had the sole voice in decision.

It is true that after the Commission had heard and decided the case petitioners filed a motion requesting it to set aside its findings and order and reopen the hearing, and one of the six grounds for the motion was that petitioners desired to submit "a revised method of determination of the originality of designs by independent arbitrators" (R. 35, 38). Whether this belated and indefinite proposal warranted reopening and reconsideration of the entire proceeding

called for an exercise of the Commission's discretionary authority, and clearly it did not abuse its discretion in denying the motion. See *International Association of Machinists* v. *National Labor Relations Board*, No. 16, this Term.

Moreover, even if the question of style piracy were to be determined by independent arbitrators, the restraints imposed by the boycott would not be free from the taint of unreasonableness. By reason of the boycott, competitors would be required to give a warranty on all goods sold to 1,600 of the country's leading retail stores that the goods sold "are not copies of styles originated by the members of The Millinery Quality Guild, Inc." (R. 13). On every such sale the competitor would be subjected to the risk that his goods would be returned unless he could successfully meet a charge of design piracy.[35] When it is borne in mind that so-called style piracy is not unlawful, that there are no denfiite criteria for determining either originality of design or what constitutes copying, and that the commercial life of a woman's hat is very short, it is clear that when competitors are subjected to the constant risk that their goods will be returned their trade is unreasonably constrained.

[35] Under the similar program in effect in the women's dress industry, it was reported that 20,000 dresses were returned to "copyists" in a three-month period (*supra*, note 24, p. 35).

CONCLUSION

It is respectfully submitted that the decree of the court below should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 251.—October Term, 1940.

Millinery Creators' Guild, Inc. (Formerly Millinery Quality Guild, Inc.), et al., Petitioners, *vs.* Federal Trade Commission. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 3, 1941.]

Mr. Justice Black delivered the opinion of the Court.

This case presents virtually the same issues as *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, this day decided. Here, as in that case, the Circuit Court of Appeals affirmed a Federal Trade Commission decree ordering the petitioners to cease and desist from certain practices found to have been done in combination and to constitute "unfair methods of competition" tending to monopoly.[1]

The members of the Guild involved in this case are designers and manufacturers of women's hats. Their Guild operates a plan modelled after that of the Fashion Originators' Guild of America, Inc.

It was stipulated by the parties that "The capacity, tendency, purpose and result of the plan . . . and the acts and practices performed thereunder . . . have been, and now are, to restrain commerce by eliminating manufacturers of stylish hats . . . as to the outlets of their products and by limiting the retail dealers . . . as to their source of supply, and to deprive the public of the benefits, if any, of competition as to price or otherwise among retailers of stylish hats in this respect . . . ." Pursuant to the evidence and to the stipulation containing this statement, the Commission found that the effect of the plan was "unduly to hinder competition and to create monopoly in the sale of women's hats in interstate commerce."

The respects in which the plan of the Millinery Creators' Guild differs from that of the Fashion Originators' Guild are not ma-

[1] 109 F. (2d) 175.

terial, and need not be set out in detail. Nor need the findings of the Commission be enumerated here. The Commission did find that the Millinery Creators' Guild had tended to hinder competition and create monopoly "By depriving the public of the benefits of normal price competition among retailers of stylish hats for women", a finding not made in the other case, but the presence or absence of such a finding is not determinative here. On the authority of *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, the decision below is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.